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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 410

GARY DUNCAN, *Appellant,*

v.

STATE OF LOUISIANA, *Appellee.*

On Appeal from the Supreme Court of Louisiana.

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT.

I. *OPINION BELOW*

The Memorandum Decision of the Supreme Court of Louisiana is reported at 250 La. 253, 195 So. 2d 142 and appears in the printed appendix at page 14. No other written opinions have been delivered.

II. *STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED*

This is a criminal prosecution against the appellant, Gary Duncan. Appellant was charged and convicted in the Twenty-Fifth Judicial District Court of Louisiana (Plaquemines Parish) of simple battery in violation of

Louisiana Revised Statutes, Section 14:35. (App. 1-3)[1] Simple battery is defined as a battery committed without a dangerous weapon and is punishable by two years imprisonment. Article 779 of the Code of Criminal Procedure of Louisiana denies a jury trial on that charge. Appellant contended that Article 779 is invalid, because it is repugnant to the Sixth and Fourteenth Amendments to the Constitution of the United States. (App. 9-13) The decision of the Supreme Court of Louisiana was in favor of the validity of Article 779. (App. 14) Jurisdiction of this appeal is conferred on this Court by Title 28 of the United States Code, Section 1257 (2).

The decision of the Supreme Court of Louisiana denying appellant's application for a writ of certiorari was rendered on February 20, 1967. (App. 14) The Notice of Appeal was filed in the Twenty-Fifth Judicial District Court of Louisiana, the Court possessed of the record, on May 15, 1967. (App. 15-16) On July 6, 1967, Honorable Joe W. Sanders, Associate Justice of the Supreme Court of Louisiana, extended appellant's time to docket the appeal in this Court to July 24, 1967. (App. 17) The appeal was docketed on July 24, 1967 and probable jurisdiction was noted by the Court on October 9, 1967.

III. *CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED*

This appeal involves Section I of the Fourteenth Amendment of the United States Constitution; Article 779 of the Louisiana Code of Criminal Procedure; Article 7 Section 41 of the Louisiana Constitution; and Louisiana Revised Statutes 14:2 and 14:35. These provisions are reprinted in Appendix A, *infra.*

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[1] "App. " references are to the separate appendix filed pursuant to Rule 36. The appendices in this Brief will be cited as "Appendix A," etc.

IV. *QUESTION PRESENTED*

Does a state statute that denies the right to trial by jury in a prosecution for battery, where a two year prison term may be imposed, violate the Sixth and Fourteenth Amendments to the United States Constitution?

V. *STATEMENT OF THE FACTS OF THE CASE*

Gary Duncan, appellant herein, is a Negro citizen of the United States, and a resident of Plaquemines Parish, Louisiana. On December 5, 1966, appellant was charged with simple battery in a bill of information filed in the Twenty-Fifth Judicial District Court of Louisiana. (App. 1) In Louisiana, simple battery is a crime punishable by a term of two years imprisonment and a fine of $300. LA. REV. STAT. 14:35 (1950). Because simple battery is not punishable by "imprisonment at hard labor," the crime is categorized as a "misdemeanor" at state law. LA. REV. STAT. 14:2 (1950). Article 779 of the Code of Criminal Procedure of Louisiana in express terms denies the right to trial by jury in misdemeanor cases.

On January 25, 1967, prior to trial in the state court, appellant filed a "Demand for Trial by Jury," in which he contended that the right to trial by jury on the charge against him was secured by the Sixth and Fourteenth Amendments to the United States Constitution. (App. 4) The demand was rejected by the trial judge on the authority of Article 779 of the Louisiana Code of Criminal Procedure. (App. 5-6; 18-19) Appellant was then tried before a judge, without a jury.

The charge against appellant was based on an incident involving his two young cousins, who had recently transferred to the formerly all-white Boothville-Venice School

under the provisions of a federal court order.[2] After the transfer, these boys were assaulted, threatened, and otherwise harassed by the white students in the school. (App. 22, 24, 32, 52) On October 18, 1966, appellant was driving home past the Boothville-Venice School and observed his two cousins confronted by four white boys on the highway. (App. 28) He stopped his car, told the Negro boys to get into his car and drove them away. (App. 31, 59, 64) At the trial, the white boys and a white onlooker some distance away testified that after the Negro boys went to appellant's car, appellant slapped one of the white boys on the arm. (App. 21, 31, 44, 49) Appellant and his two cousins each testified that appellant had not slapped the boy, but had merely touched him on the elbow, as a manner of expression, while telling him that it would be best if he went home. (App. 53-54, 60, 64)

The trial judge resolved the factual dispute against the appellant and found him guilty as charged. (App. 3) On February 1, 1967, appellant perfected a formal bill of exception on the jury trial issue, in accordance with state procedure. (App. 5-6) He was then sentenced to sixty days in prison and a $150 fine, with the proviso that if the fine and costs are not paid, an additional twenty day sentence shall be served. (App. 3)

On February 6, 1967, appellant filed in the Supreme Court of Louisiana an application for a writ of certiorari to review the judgment below, and specifically the ruling of the court on appellant's demand for trial by jury. (App. 9-13) In the application, appellant expressly argued that Article 779 of the Louisiana Code of Criminal Procedure is "unconstitutional on its face", under the Sixth and Fourteenth Amendments to the United States Constitution, "in-

[2] United States v. Plaquemines Parish School Board, 11 Race Rel. L. Rep. 1764 (E. D. La., Aug. 26, 1966).

sofar as it denied [appellant] the right to trial by jury in this case." (App. 12-13) On February 20, 1967, the Supreme Court of Louisiana denied appellant's application for a writ of certiorari. The Memorandum Decision stated: "No error of law in the ruling complained of." 250 La. 253, 195 So. 2d 142 (1967); (App. 14). The Supreme Court of Louisiana is the highest court in the State of Louisiana. Appellant is free on bond set by the trial court pending disposition of the matter in this Court.

VI. *SUMMARY OF ARGUMENT*

In *Maxwell v. Dow*, 176 U.S. 581, decided in 1900, this Court held that the Fourteenth Amendment does not secure the right to trial by jury in state criminal proceedings. The Court has not since considered the question. The reasoning that led to the decision of the Court in *Maxwell*—namely that the Fourteenth Amendment does not make applicable to the states any of the specific guarantees of the Bill of Rights—is completely at odds with the recent decisions of the Court interpreting the due process clause to apply most of the Bill of Rights guarantees to the states. In these decisions, the Court has held that a specific provision of the Bill of Rights—and particularly of the Sixth Amendment—is applicable to state criminal proceedings if it is a "fundamental" protection in our legal system. Under this standard, application of the Sixth Amendment jury trial guarantee is plainly required.

Trial by jury was one of the most valued rights in the English common law and was jealously guarded by the American colonists. It is the only procedural right included in the body of the Constitution and reiterated in the Bill of Rights. This Court has always emphasized the great importance of the right to trial by jury in criminal cases. Its decisions on jury selection and jury impartiality demon-

strate the Court's concern for the integrity of the criminal jury. The overwhelming majority of the states guarantee a jury trial right in criminal cases as broad as that secured in federal courts by the Sixth Amendment. This state practice attests to the importance of the criminal jury in our legal system, and, in addition, establishes that availability of the right to jury trial in criminal cases (as distinct from petty offenses) does not impose an undue burden on the administration of the criminal law.

Trial by jury secures due process of law in a criminal trial. The criminal jury serves as an indispensable protection against arbitrary or oppressive prosecutions by the government and additionally introduces a human element into the administration of the criminal laws, by permitting the "voice of the community" to temper the application of strict legal principles. The American system of criminal procedure was designed with a jury in mind, and in that system the divorcement of functions between the judge and the jury is necessary to ensure trial fairness.

VII. *ARGUMENT*

The Fourteenth Amendment Requires That An Accused Be Afforded The Right To Trial By Jury In State Criminal Proceedings

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury. . . ." The Court has interpreted this guarantee to be applicable to the trial of all "crimes", but not to the trial of "petty offenses". *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937); *District of Columbia v. Colts*, 282 U.S. 63

(1930); *Callan v. Wilson*, 127 U.S. 540, 557 (1888). It is perfectly clear that battery, punishable by two years imprisonment is a "crime" as defined by the decisions of this Court, and that, if the case had been tried in a federal court, appellant unquestionably would have been entitled to trial by jury under the Sixth Amendment.[3] Thus, this appeal squarely raises the question of whether there is a comparable Fourteenth Amendment right to trial by jury in state criminal proceedings.

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[3] Simple battery, as defined by Louisiana Revised Statutes 14:35, is a crime, triable by jury under the Sixth Amendment standard, regardless of whether the test is an offense having a potential maximum term of imprisonment of more than six months (18 U.S.C. Sec. 1; Cheff v. Schnackenberg, *supra*, 384 U.S. at 379-80), an offense indictable at common law, (District of Columbia v. Colts, *supra*, 282 U.S. at 73; Callan v. Wilson, *supra*, 127 U.S. at 554-57), or an offense that is *malum in se* (District of Columbia v. Colts, *supra*, 282 U.S. at 73; Cheff v. Schnackenberg, *supra*, 384 U.S. at 387-90 (dissenting opinion of Mr. Justice Douglas); Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 980 (1926)). It is apparent that battery under LA. REV. STAT. 14:35 meets the "potential maximum penalty" and "*malum in se*" tests. Moreover, battery was an indictable offense at common law. III BLACKSTONE, COMMENTARIES* 121; IV Id. at *6, 216-17, I CHITTY, CRIMINAL LAW 138-49 (1819); I RUSSELL, CRIMES AND MISDEMEANORS *60 (1819); II HAWKINS, PLEAS OF THE CROWN 17 (7th ed. 1795).

Although Louisiana categorizes simple battery as a "misdemeanor," this court has held the legislative classification of common law offenses as "misdemeanors" or "felonies" to be irrelevant for purposes of interpreting the Sixth Amendment jury trial guarantee. Callan v. Wilson, 127 U.S. 540, 549 (1888). Compare Harvey v. Mississippi, 340 F. 2d 263, 271 (5th Cir. 1965); McDonald v. Moore, 353 F. 2d 106, 109-10 (5th Cir. 1965). In any event, the crime defined by LA. REV. STAT. 14:35 is a felony under federal standards. 18 U.S.C. Sec. 1. In jurisdictions applying the common law or Sixth Amendment standard, a defendant charged with battery had been consistently guaranteed the right to trial by jury. *In re* Robinson, 20 D.C. 570, 571 (Sup. Ct. D.C. 1892); State v. Stewart, 89 N. Car. 563, 564 (1883); Work v. State, 2 Ohio St. 296 (Sup. Ct. 1853).

The common law "petty offenses" were of a nuisance nature and did not involve serious immorality. Classic instances were disorderliness, drunkenness, vagrancy and violations of health, safety, trade, fish and game regulations. See IV BLACKSTONE, *supra* at 279, 281; 3 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 264-65; FRANKFURTER AND CORCORAN, *supra*, 39 HARV. L. REV. at 983-1019. In every case in which this Court has held an offense to be triable without a jury in a federal court, it has emphasized the lack of serious immorality associated with the offense. *E.g.*, District of Columbia v. Clawans, 300 U.S. 617, 625 (1937) (selling unused railway tickets without a license; "its moral quality is relatively inoffensive") Schick v. United States, 195 U. S. 65 (1904) (sale of unstamped oleomargarine; an offense "not necessarily involving any moral delinquency").

A. *The Court's Earlier Refusal to Require Trial by Jury in State Criminal Proceedings was Based on an Interpretation of the Fourteenth Amendment That Has Long Been Abandoned*

Sixty-seven years ago, in *Maxwell v. Dow*, 176 U.S. 581 (1900), the Court held that the Fourteenth Amendment does not make the jury trial guarantee of the Sixth Amendment applicable to state proceedings. Specifically, *Maxwell* sustained the use of an eight man jury in a state criminal trial, although two years earlier, in *Thompson v. Utah*, 170 U.S. 343 (1898), the Court held that the Sixth Amendment requires a jury of twelve in federal criminal trials.[4] The result reached in *Maxwell* was based on the then prevailing view that the Fourteenth Amendment does not make any of the specific guarantees of the Sixth Amendment—or, indeed, of the Bill of Rights—applicable to the states, and that the mandate of due process of law is satisfied whenever a defendant is tried according to uniform procedures established by state law. 176 U.S. at 602-05. *Accord, West v. Louisiana*, 194 U.S. 258, 264 (1904).

The question of whether there is a federal constitutional right to trial by jury in state criminal proceedings has not been decided by the Court since *Maxwell*, although in several cases involving other issues there have been statements that such a right is not secured by the Fourteenth Amendment. See, *e.g.*, *Fay v. New York*, 332 U.S. 261, 288 (1947); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); *Synder v. Massachusetts*, 291 U.S. 97, 105 (1934). The question has thus never been decided by the Court in the context of a complete denial of trial by jury. *Cf. Maxwell v. Dow, supra*, 176 U.S. at 612 (Mr. Justice Harlan dissenting).

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[4] Thompson v. Utah arose at a time when Utah was a territory, and the Sixth Amendment applied directly to criminal proceedings within that jurisdiction. 170 U.S. at 347-49.

More recent decisions of the Court have completely undermined the rationale of *Maxwell* and *West*. Apart from the right to trial by jury, the Court has held every guarantee of the Sixth Amendment applicable to state criminal proceedings. See *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (public trial and notice of the accusation); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel). These decisions are part of a broader trend toward the application to state criminal trials of rights secured by the Bill of Rights. See *Ker v. California*, 374 U.S. 230 (1963) (Fourth Amendment standard of legality of searches without a warrant); *Aguilar v. Texas*, 378 U.S. 108 (1964) (Fourth Amendment standard for the issuance of a search warrant); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment exclusion of illegally seized evidence); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment protection against self-incrimination); *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment protection against cruel and unusual punishment).

The language of the more recent decisions strongly suggests the Court considers all Sixth Amendment rights applicable in state proceedings.

> At one time, it was thought that the Sixth Amendment had no application to state criminal proceedings [citing *West v. Louisiana*, 194 U.S. 258, 264 (1904)]. That view no longer prevails, and in recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law.

Washington v. Texas, supra, 388 U.S. at 18 (Chief Justice Warren for the Court).

> In light of *Gideon*, *Malloy*, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the states by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law.

Pointer v. Texas, *supra*, 380 U.S. at 406 (Mr. Justice Black for the Court).

The decision to apply a particular guarantee of the Bill of Rights to state criminal proceedings has depended on the Court's determination as to whether the right is "so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment." *Washington v. Texas*, 388 U.S. at 17-18. See *Pointer v. Texas*, *supra*; *Gideon v. Wainwright*, *supra*; Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 772 (1961). In *Pointer v. Texas*, *supra*, the Court stated "[t]hat the fact that [a] right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that [it is] a fundamental right essential to a fair trial in a criminal prosecution." 380 U.S. at 404. Of course, if this *dictum* provides the test, application of the jury trial guarantee necessarily follows.

Indeed, it may be that the Court has already applied this guarantee to state criminal proceedings. In *Parker v. Gladden*, 385 U.S. 363 (1966), the Court held that "the command of the Sixth Amendment . . . that 'the accused shall enjoy the right to a . . . trial by an impartial jury . . .' [is] made applicable to the states through the Due Process Clause of the Fourteenth Amendment." 385 U.S. at 364. See *Irwin v. Dowd*, 366 U.S. 717, 721-22

(1961). Although the facts in *Parker* concerned the impartiality of the jury, it is doubtful that the Court intended to dissect, for purposes of incorporation, what appears as a unitary guarantee in the Sixth Amendment. If the Court's concern had been for impartiality alone, as an aspect of trial fairness, it would have been enough to base the decision on the unassisted Due Process clause.[5]

But, apart from the question of whether the issue now presented is substantially determined in favor of the jury right by *Parker v. Gladden* and the other cases applying Sixth Amendment guarantees to state criminal proceedings, it is, at the very least, fair to say that the Court's holding in *Maxwell v. Dow*, and its *dicta* in such cases as *Snyder* and *Palko* are no longer controlling.[6] Under the conception of Fourteenth Amendment Due Process recently affirmed in *Gideon*, *Pointer* and *Washington v. Texas*, all *supra*, appellant submits that application of the Sixth Amendment jury trial guarantee to state criminal proceedings is required: (1) by historical and contemporary recognition of the fundamental nature of the jury trial right in

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[5] The United States Court of Appeals for the Second Circuit in United States *ex rel.* De Lucia v. McMann, 373 F. 2d 759, 762 (1967) and Judge Van Voorhis, dissenting from the decision of the New York Court of Appeals in People v. De Lucia, 20 N. Y. 2d 275, 282 N. Y. Supp. 526, 531 (1967) interpreted *Parker* v. *Gladden* as holding the Sixth Amendment jury trial guarantee applicable to state criminal proceedings.

[6] The applicability of the Sixth Amendment jury trial guarantee to the states has been recognized in the lower federal courts as an important, but unsettled question. In Randel v. Beto, 354 F. 2d 497 (1965), the United States Court of Appeals for the Fifth Circuit held that a habeas corpus petitioner's claim based on application of the Sixth Amendment jury trial guarantee to state proceedings was an "important question. . . of constitutional law," entitling petitioner to a hearing. 354 F. 2d at 500. In United States *ex rel.* Gerchman v. Maroney, 355 F. 2d 302 (3d Cir. 1966), Judge Freedman suggested that past statements in this Court concerning the applicability of the jury trial guarantee to the states "are not . . . flatly decisive of the question," in light of the recent decisions holding other guarantees of the Bill of Rights applicable to state proceedings. 355 F. 2d at 313. Judge Freedman refrained from passing on the issue, because the case was disposed of on other grounds, and because he thought it "not unlikely that we may soon have an authoritative expression on the subject from the Supreme Court". 355 F. 2d at 315. The other members of the panel thought the question foreclosed by decisions of this Court. 355 F. 2d at 315-16.

our system of criminal law; and (2) by the essential role which the jury serves in assuring a defendant a fair trial in accordance with due process of law.

B. *Trial by Jury in Criminal Cases Is Recognized As A Fundamental Guarantee in Our System of Law*

1. Trial by Jury was Recognized at Common Law and by the Framers of the Constitution as an Essential Element of a Fair Trial.

Trial by jury in criminal cases was considered to be a basic safeguard of individual liberties centuries before the adoption of the American Constitution. The right is traceable to the earliest Saxon colonies,[7] and constituted one of the fundamental articles of the Magna Charta: "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties . . . but by the lawful judgment of his peers . . ." Magna Charta, ch. 39, translated and quoted in COKE, THE SECOND PART OF THE INSTITUTE OF THE LAWS OF ENGLAND 45 (Brooke's 5th ed. 1797). Soon after the thirteenth century trial by jury had become the principal institution for trial of criminal cases. JENKS, A SHORT HISTORY OF ENGLISH LAW 52 (5th ed. 1938).[8] Blackstone described the right to trial by jury in criminal cases as "the most transcendent privilege which any subject can enjoy, or wish for. . . . [T]he liberties of England cannot but subsist, so long as the *palladium* . . . [of trial by jury] remains sacred and inviolate." III BLACKSTONE, *op. cit. supra*, at *379. Compare 1 COKE, LITTLETON* 155b.

The guarantee of trial by jury in criminal cases was further secured in England by its express inclusion in the

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[7] III BLACKSTONE, *op. cit. supra* at *349; SOURCES OF OUR LIBERTIES, 7-9 (Perry, ed. 1959).

[8] See Singer v. United States, 380 U.S. 24, 27 (1965).

English Bill of Rights of 1689.[9] This document served as one of the basic sources for the Bill of Rights to the United States Constitution. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, p. 19 (1955).

The right to trial by jury in criminal cases was fundamental to the American colonists. Indeed, Parliamentary infringement of this right in the colonies was one of the major grievances of the colonists against British rule. The Declaration of Rights issued in 1765 by the Stamp Act Congress, consisting of delegates from nine of the thirteen original colonies, stated:

> "Trial by jury is the inherent and invaluable right of every British subject of these colonies."[10]

The framers of the Declaration of Independence listed the denial "in many cases, of the benefit of Trial by Jury" as an example of the "repeated injuries and usurpations" of the King of England "all having in direct object the establishment of an absolute tyranny over these States." See also John Adams, *Instructions of the Town of Braintree, Massachusetts on the Stamp Act* (October 14, 1765); Resolution No. 5, Declaration and Resolves of the First Continental Congress (October 14, 1774).

Between the War of Independence and the formation of the American Union, constitutions were adopted by eleven of the former crown colonies. Without exception, these documents guaranteed trial by jury in criminal cases, after the pattern of English law.[11] Trial by jury in

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[9] I Will. III and Mary II, sess. 2, c. 2 (1689), para. 11.

[10] SOURCES OF OUR LIBERTIES 270 (Perry, ed. 1959).

[11] See THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS, V, 2594-98 (1909) (New Jersey Constitution of 1776); *Ibid.*, V, 2623-38 (New York Constitution of 1777); *Ibid.*, VI, 3248-57 (Constitution of South Carolina of 1778); *Ibid.*, II, 777-85 (Constitution of Georgia of 1777); *Ibid.*, VII, 3812-14 (Consti-

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criminal cases is one of the very few individual rights that the framers included in the body of the United States Constitution. Article III, Section 2. See THE FEDERALIST No. 83 (Hamilton). It is the only such provision that is reiterated in the Bill of Rights. See *Toth v. Quarles*, 350 U.S. 11, 16 (1955).[12]

In his treatise on the Constitution published in 1833, Mr. Justice Story reflected the contemporary view of the "antiquity" and "importance of trial by jury in criminal cases."

> It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes one of the fundamental articles of the Magna Charta. . . . When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law, which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the constitution of the United States would have been justly obnoxious to the most conclusive objec-

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[11] Continued

tution of Virginia of 1776, Sec. 8); *Ibid.*, V, 3081-84 (Constitution of Pennsylvania of 1776, Sec. IX); *Ibid.*, III, 1686-91 (Constitution of Maryland of 1776, Sec. XIX); *Ibid.*, V, 2787-89 (Constitution of North Carolina of 1776, Sec. IX); *Ibid.*, III, 1888-93 (Constitution of Massachusetts of 1780, Pt. 1, Sec. 12); *Ibid.*, IV, 2453-57 (Constitution of New Hampshire of 1784, Art. I, Sec. 15); I Laws of the State of Delaware, 1700-1797, App. 1981 (New Castle, 1797) (Delaware Declaration of Rights of 1776, Sec. 14). In addition Vermont, which had not been recognized as a Crown Colony, included the jury trial guarantee in its Constitution of 1777. THORPE, *supra*, VI, 3737-42.

[12] In his opinion in *Reid* v. *Covert*, 354 U.S. 1 (1957) Mr. Justice Black referred to the "common knowledge" that fear of abolition of trial by jury was one of the principal sources of objection to the federal constitution and provided an important reason for the adoption of the Bill of Rights. 354 U.S. at 9, n.12.

> tion, if it had not recognized and confirmed it in the most solemn terms.[13]

The history of the right to trial by jury and its reception in this country clearly establish that it is one of the basic rights preserved by our Constitution.

2. This Court has Consistently Recognized Trial by Jury in Criminal Cases As A Right of Fundamental Importance.

Over 100 years ago, in *Ex Parte Milligan*, 71 U.S. 2, 123 (1866), this Court described "the inestimable privilege of trial by jury . . . [as] a vital principle underlying the whole administration of criminal justice." In *Toth v. Quarles*, 350 U.S. 11 (1955), the Court stated that:

> [T]he Constitution and the Amendments in the Bill of Rights show that the Founders were not satisfied with leaving determination of guilt or innocence to judges, . . . [O]ther safeguards designed to protect defendants against oppressive governmental practices were included. One of these was considered so important to liberty of the individual that it appears in two parts of the Constitution. . . . *This right of trial by jury ranks very high in our catalogue of constitutional safeguards.* 250 U.S. at 16 (emphasis supplied).

The decision of the Court in *Reid v. Covert*, 354 U.S. 1 (1957) concerned the applicability of Fifth and Sixth Amendment rights to the trial of civilians attached to military personnel. The plurality opinion accepted the premise set forth by the Government that only those constitutional rights which are "fundamental" protect Americans abroad, but held trial by jury in criminal cases to be among those rights. 354 U.S. at 9.

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[13] 2 STORY, CONSTITUTION OF THE UNITED STATES 527 (2d ed. 1851).

> [I]n view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial by a civilian judge and an independent jury picked from the common citizenry are not fundamental rights. 354 U.S. at 9-10.

Accord, Kinsella v. Singleton, 361 U.S. 234, 249 (1960). "Fundamentalness" is, of course, the same test that has governed the application of Bill of Rights guarantees to the states.

In *Irwin v. Dowd*, 366 U.S. 717 (1961), the Court recognized the essential role of trial by jury in our legal heritage in the following terms:

> England, from whom the Western world has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, *the most priceless of which is trial by jury.* This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a state's criminal procedure, Fay v. New York, 332 U.S. 261; Palko v. Connecticut, 302 U.S. 319, every state has constitutionally provided trial by jury. . . . *In the ultimate analysis, only the jury can strip a man of his liberty or his life.* 366 U.S. at 721-22 (emphasis supplied).

See also *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965); *Thompson v. Utah, supra*, 170 U.S. at 349-53.[14]

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[14] In his James Madison lecture at the New York University School of Law, Mr. Justice Brennan, referring to the articulated standards of due process of law set forth by the Court in such older cases as Hurtado v. California, 110 U.S. 516, 535 (1884); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), and Palko v. Connecticut, 302 U.S. 319, 325 (1937), asked rhetorically whether "Madison [would] have thought that the right of . . . an accused, to enjoy the right in criminal prosecutions to a speedy and public trial by an impartial jury of twelve, to be confronted

In *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), this Court ruled that even in criminal contempt cases, where there is considerable question about the practice at common law,[15] a sentence in excess of six months, the statutory maximum for "petty offenses"[16] may not be imposed by a federal court without trial by jury. And in *Bloom v. Illinois* (No. 52, this term) the Court will consider whether the rule articulated in *Cheff* is applicable, by virtue of the Fourteenth Amendment, to criminal contempt proceedings in state courts.

The Court has shown its concern for the integrity of trial by jury in a long line of decisions, dating back to *Strauder v. West Virginia*, 100 U.S. 303 (1880), invalidating the systematic exclusion of Negroes from grand and petit juries. *E.g., Norris v. Alabama*, 294 U.S. 587 (1935); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Eubanks v. Louisiana*, 356 U.S. 584 (1958). In recent years, this Court and the lower federal courts have further secured the common law mandate that no man be convicted other than by a "judgment of his peers"[17] by insisting that juries in state and federal courts be selected in a manner that will ensure a representative cross section of the community on venire lists. *E.g., Whitus v. Georgia*, 385 U.S. 545 (1967) (exclusion of Negroes); *Hernandez v. Texas*, 347 U.S. 475 (1954) (exclusion of Mexican-Americans);

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[14] Continued
with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense, were rights unnecessary to 'the very essence of a scheme of ordered liberty,' or that any was not among 'the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions', or not among those personal immunities which are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'?" Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. Rev. 761, 777 (1961).

[15] Compare Barnett v. United States, 376 U.S. 681, 701-24 (1964) (Appendix to Opinion of the Court), with *Id.* at 740-51 (dissenting opinion of Mr. Justice Goldberg).

[16] 18 U.S.C. Sec. 1.

[17] Magna Charta, ch. 39, *supra*.

Labat v. Bennett, 365 F. 2d 698 (5th Cir. 1966) (en banc), *cert. denied*, 386 U.S. 991 (1967) (exclusion of wage earners); *White v. Crooke*, 251 F.Supp. 401 (M. D. Ala. 1966) (three judge court) (exclusion of women).[18] See *Schowgurow v. State*, 240 Md. 121, 213 A. 2d 475 (1965) (exclusion of atheists).[19]

Further, this Court has repeatedly struck down state court convictions, where it appeared that jurors had been exposed to prejudicial newspaper publicity or other influences inimical to the defendant. *Parker v. Gladden*, *supra* (remarks of bailiff); *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (newspaper publicity); *Estes v. Texas*, 381 U.S. 532, 545 (1965) (broadcasting of trial); *Irwin v. Dowd*, *supra* (newspaper publicity); *Moore v. Dempsey*, 261 U.S. 86 (1923) (mob domination).

It would be ironic indeed if a state were permitted to nullify this Court's carefully developed protections of the jury system by substituting for trial by jury trial by a single judge, who obviously does not represent a fair cross section of the community and who is frequently exposed to official and unofficial influences prejudicial to the defendant. See Section C(3), *infra*, pp. 28-31.

3. The Fundamental Importance of Trial by Jury in Criminal Cases Has Been Widely Recognized by the States.

The practice of the American states with respect to trial by jury in criminal matters is a further measure of

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[18] But see Hoyt v. Florida, 368 U.S. 57 (1961).

[19] The right of a defendant to a jury reflecting a fair cross section of the community has been held to apply where there is no proof of actual prejudice to the defendant, Pierre v. Louisiana, 306 U.S. 354 (1939); Strauder v. West Virginia, *supra*, 100 U.S. at 309, and where the defendant is not a member of the class excluded, Allen v. State, 110 Ga. App. 56, 137 S. E. 2nd 711 (1964); State v. Madison, 240 Md. 265, 213 A. 2d 880 (1965). See Labat v. Bennett, *supra*, 365 F. 2d at 723, n. 43.

the essential nature of this guarantee. See *Ferguson v. Georgia*, 365 U.S. 570 (1961). Every state makes some provision for trial by jury in criminal cases. More significantly, in thirty-eight states a right as broad as that given in federal courts by the Sixth Amendment is guaranteed by law; in each of these states a defendant in a criminal case subject to a maximum term of imprisonment in excess of six months cannot be convicted without the unanimous verdict of a twelve man jury.[20] See Appendix B, *infra*, which sets forth the scope of the right to trial by jury in each of the states other than Louisiana. In ten additional states, and most of New York,[21] a jury trial is provided in every case where the maximum term of imprisonment exceeds six months, but modifications of the requirements of twelve jurors or a unanimous verdict are made in some less serious cases, frequently only cases not punishable by more than a year imprisonment. Appendix B. With one narrow exception,[22] Louisiana is the only jurisdiction in the United States where all right to trial by jury is denied in a class of cases in which the right is

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[20] In Patton v. United States, 281 U.S. 276 (1930), the Court stated that the Sixth Amendment guarantees a twelve man jury and a unanimous verdict. See Thompson v. Utah, 170 U.S. 343 (1898). This Court, relying on 18 U.S.C. Sec. 1, has recently defined the petty offense exception to the Sixth Amendment jury trial right, as limited to offenses punishable by less than six months imprisonment. Cheff v. Schnackenberg, 384 U.S. 373 (1966). But see *Id.* at 387-90 (dissenting opinion of Mr. Justice Douglas); District of Columbia v. Colts, 282 U.S. 63 (1930), suggesting that offenses punishable by less than six months nevertheless may be crimes, and not petty offenses. See note 3, p. 7, *supra*.

[21] The New York practice is set forth in Appendix B, *infra*, p. 8a. A right to trial by jury in all cases where punishment may exceed six months is provided in New York State, outside New York City, although in cases where the punishment may not exceed one year only six jurors are required. No right to trial by jury is provided in New York City in cases in which the potential maximum is less than one year. The proposed revised Constitution for the State of New York, which was rejected by the voters on November 7, 1967, eliminated the special provision for New York City and provided for jury trial throughout the state in all criminal cases where the potential sentence exceeds six months. Article 1, Section 7b; New York Times, November 9, 1967, p. 28, col. 3-4 (Late City Edition).

[22] See note 21, *supra*.

guaranteed at common law and under the Sixth Amendment. In Louisiana, all right to trial by jury—even a jury that does not meet common law requirements—is denied in a number of serious criminal cases, including at least one offense punishable by up to ten years imprisonment.[23] In most other cases, trial by a five man jury, or a twelve man jury, only nine of whom must concur in a verdict, is provided. A jury that conforms to the requirements of the common law and the Sixth Amendment is available in Louisiana only in capital cases. See Appendix C, *infra*, which sets forth the provisions of Louisiana law relating to trial by jury in criminal cases.

The general acceptance by the states of the right to trial by jury in criminal cases not only attests to the importance of this right; it precludes any argument that the result urged by the appellant would impose an intolerable burden on state procedure. The prevailing practice in the overwhelming majority of American states is incontrovertible evidence of the workability of a requirement that trial by jury be provided whenever a defendant may be imprisoned for a period in excess of six months.

In any event, considerations of burden are not an appropriate basis for limiting the application of constitutional rights.

> It is undoubtedly true that a judge can dispose of charges . . . faster and cheaper than a jury. But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it

[23] La. Rev. Stat. 14:34.1 (Cum. Supp. 1962).

> more difficult for the government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy."

Green v. United States, 356 U.S. 165, 216 (1958) (Mr. Justice Black, dissenting).

Blackstone warned against attacks on the jury trial in the name of convenience. "Let it be remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution . . ." III BLACKSTONE, COMMENTARIES 379. The right to trial by jury "is not held by sufferance, and cannot be frittered away on any plea of state or political necessity." *Ex Parte Milligan*, 71 U.S. 2, 123 (1866).

C. *Due Process of Law Requires Trial by Jury in Criminal Cases*

1. Trial by Jury Secures the Individual Against Arbitrary Official Conduct.

The pervasive acceptance of the jury trial in our system of criminal law is largely attributable to the historic role of the jury in protecting accused persons against arbitrary official conduct. Blackstone warned against trial by a "justice . . . named by the Crown . . . who might . . . imprison any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure." IV BLACKSTONE, *op. cit. supra* at 349-50.[24] This

[24] ". . . [I]n times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the king and the subject, than in disputes between one individual and another. . . . [T]he founders of the English law have with excellent forecast contrived . . . that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [defendant's] equals and neighbours, indifferently chosen and superior to all suspicion." IV BLACKSTONE, *op. cit. supra* at *349-50.

court has recognized this important role of the petit jury:

> "On many occasions, fully known to the Founders of this Country, jurors—plain people—have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices. The acquittal of William Penn is an illustrious example." [25]

Toth v. Quarles, supra, 350 U.S. at 18-19. The point was reiterated by Mr. Justice Black in his opinion in *Reid v. Covert, supra:*

> Trial by jury in a court of law and in accordance with traditional modes of procedure . . . has served and remains one of our most vital barriers to governmental arbitrariness." 354 U.S. at 10.[26]

This case is an example of the continued vitality of these principles. Appellant is a Negro resident of Plaquemines Parish, Louisiana. He was arrested at the height of intense opposition by parish officials to court-ordered desegregation of the Plaquemines Parish public schools.[27]

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[25] Penn was tried at Old Bailey in 1670 on charges of violation of the Conventicle Act, which prohibited religious services other than those conducted according to the rites of the Church of England. In the face of clear evidence of Penn's violation of the Act, the jury acquitted. Nager, *The Jury That Tried William Penn,* 50 A.B.A.J. 168 (1964) "After trial the jurors were fined for acquitting Penn contrary to the Court's instructions. One was imprisoned for not paying the fine, but the Court of Common Pleas released him in a habeas corpus proceeding, upholding the freedom of the jury to decide the case. Bushell's Case (Eng.) 6 How. St. Tr. 999." Toth v. Quarles, *supra,* 330 U.S. at 19, n. 13.

[26] Writing in 1833, De Tocqueville observed that:

> . . . All sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury.

1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 294 (Bradley, ed. 1945). The action of the Greek military junta, on November 3, 1967, in abolishing the right to trial by jury in criminal cases provides an unfortunately recent reminder of the validity of this analysis. New York Times, November 4, 1967, p. 9, col. 3 (City Edition).

[27] See United States v. Plaquemines Parish School Board, Civil Action No. 66-71A, 12 Race Rel. L. Rep. 219 (E. D. La. Oct. 21, 26, 1966 (Supplemental Order)); *Id.,* Findings of Fact and Conclusions of Law (June 27, 1967); *Id.,* Application of the United States of America for an Order to Show Cause Why the Defendants Should Not be Held in Civil Contempt, filed September 8, 1967, pending.

The prosecution was initiated not by the indictment of a grand jury, but by a Bill of Information filed by the District Attorney, Leander H. Perez, Jr. (App. 1-2). The substance of the charge was that in attempting to break up a potentially violent confrontation near the Boothville Venice School between four white boys and two Negro boys—both cousins of the appellant, who had recently transferred to the formerly all-white school—appellant slapped one of the white boys on the arm. At trial, appellant and the two Negro boys testified that appellant had not slapped the boy. (App. 53-54, 60, 64). The white boys, and a white onlooker some distance away, testified that he had. (App. 21, 31, 44, 49). The trial judge resolved the factual dispute in favor of the state.

Once the factual dispute was resolved in the state's favor on the basis of more than "no evidence",[28] in a proceeding that had the objective earmarks of fairness,[29] no procedures remained available for the vindication of appellant's asserted innocence. *Cf. City of Greenwood v. Peacock*, 384 U.S. 808, 828-29 (1966).

It is plain that in cases such as this—where the personal and political leanings of the trial judge will often be antagonistic to the defendant—the potential for a factual determination that is influenced by considerations other than the evidence of record is very great. This situation, particularly in civil rights related prosecutions in the Deep South, is not uncommon. Because of the accepted limitation on federal review and state appellate review of factual determinations in state trial courts, the only effective remedy is to guarantee the accused the right to have

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[28] Thompson v. Louisville, 362 U.S. 199 (1960). The Supreme Court of Louisiana, the only appellate court for criminal cases in Louisiana, is constitutionally prohibited from reviewing questions of fact in a criminal case. LA. CONST. Art. 7, Section 10 (1921).

[29] Townsend v. Sain, 372 U.S. 293 (1963).

the crucial factual determination of guilt or innocence made by a jury, rather than by a judge. Trial by twelve jurors representing a cross-section of the community not only dilutes the effect of any individual bias, it tends to make certain that persons not antagonistic to the accused will participate in the fact-finding process.

In our democratic society, trial by jury provides both symbolic expression and indispensable practical protection of the concept that the decision to adjudge a citizen a criminal and to deprive him of his liberty is too important to be committed to professional administrators alone—judges separated by class, by function, by experience and often by considerations of interest and political leaning from the people they judge. *Cf. Toth v. Quarles, supra,* 350 U.S. at 17. Community participation—in the form of trial by jury —has become a vital balance wheel in the administration of American criminal justice, protecting accused persons from judicial arbitrariness or discrimination. This historic role of the petit jury is an essential element of due process in our legal system.

2. The Criminal Jury Serves to Ameliorate Harsh or Technical Application of Law.

The criminal jury has performed an important ameliorative function in the Anglo-American legal system. Because an accused may not be convicted, regardless of the strength of the case against him, without the concurrence of the jury, the jury is free to take what Chief Justice Cooley referred to as "the common sense view of a set of circumstances" (*People v. Garbutt,* 17 Mich. 9, 27 (1868)), and reject strict application of legal principles in favor of a result it considers just. In the words of Mr. Justice Holmes, "the jury has the power to bring in a verdict in the teeth of both law and fact." *Horning v. District of*

Columbia, 254 U.S. 135, 138 (1920). The essentially democratic role of the jury, "interposing 'the voice of the community' against the possible excessive zeal of prosecutors," *United States v. Maybury*, 274 F. 2d 899, 903 (2d Cir. 1959), has been consistently recognized by this Court and the lower federal courts, *United States v. Dotterweich*, 320 U.S. 277, 279 (1943); *Dunn v. United States*, 284 U.S. 390, 393 (1932); *United States v. Vastine*, 363 F. 2d 853, 854-55 (3d Cir. 1966); *Jackson v. United States*, 313 F. 2d 572, 574-575 (D. C. Cir. 1962); *Cacy v. United States*, 298 F. 2d 227, 228-229 (9th Cir. 1961); *United States v. Margoles*, 294 F. 2d 371, 373 (7th Cir. 1961). See also 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 623-626 (2d ed. 1959); PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 125; 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 317; 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293-94 (Bradley ed., 1945).[30]

In practical operation, the exercise of this ameliorative power by the jury has provided a valuable safeguard for the accused against wooden application of the criminal law. It has ensured that criminal convictions comport with the community's notions of fairness and equity.[31] The right not to be convicted without the concurrence of the community, in the form of a unanimous jury verdict, is an essential ingredient of due process in our system of law.

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[30] The power of a jury, but not a judge, to "indulge in precisely such motives or vagaries" (United States v. Dotterweich, *supra*, 320 U.S. at 279), provides the basis of the rule that permits inconsistency in a jury verdict, but requires consistency in the verdict of a judge. Compare United States v. Dunn, *supra*, with United States v. Maybury, *supra*.

[31] A recent study reveals that a jury frequently acquits, despite proof of the technical commission of a crime, because it views the offense as *de minimis*, it disagrees with the law, it believes that the defendant has been punished enough as a result of the crime, or it believes the punishment threatened—including the extra legal consequences of conviction—is too severe. KALVEN & ZEISEL, THE AMERICAN JURY 258-85; 286-97, 305, 306-12 (1966). Kalven and Zeisel report, based on evaluations of 3,567 jury trials by the trial judges, that the jury acquitted almost twice as often as would the trial judge. P. 56. The jury's sentiments on the law or about the particular defendant or crime explain or contribute to explaining 76% of the disagreements. P. 111.

3. The Determination of Guilt or Innocence by a Trier Other than the Trial Judge is Often a Necessary Condition of a Fair and Rationally Conducted Trial.

Several related, intensely practical, virtues of jury trial are recognized by every experienced criminal practitioner and have contributed to the enduring faith which American justice places in the jury system. Although these endemic characteristics of jury trial serve principally to protect the defendant, it would be a mistake to regard them merely as the instrument of partisan tactical advantage. Rather, they have proved in day-to-day administration of our criminal law vital contributing factors, and often indispensable conditions, of a fair and rational trial process. In this connection the obvious point must be emphasized that the American jury cannot realistically be viewed out of the context of the entire complex of institutions and procedures which have evolved for the administration of criminal law in this country. Other institutions and procedures—involving differently qualified and selected judges, different methods of investigating and determining issues or different conceptions of evidence and proof—might develop methods of assuring trial fairness without the intervention of a jury. The American system, however, has been designed principally with the jury in view and for a number of reasons its fair administration requires maintenance of the right to jury trial. In the following subsections, the most significant of those reasons are identified. The concerns which they involve may not in isolation rise to the stature of independent federal constitutional rights. But in combination they compellingly support recognition of the right to trial by jury as a guarantor of the fair and regular criminal trial that due process of law requires.

(a) *Denial of Trial by Jury Lessens the State's Burden of Persuasion.*

This Court has indicated that in a criminal case due process of law requires proof of guilt beyond a reasonable doubt. *Leland v. Oregon*, 343 U.S. 790 (1952). Of course, this standard was developed and defined in the context of trial by jury. See IX WIGMORE, EVIDENCE § 2497 (3d ed. 1940).. Since it is plain that a prosecutor carries a far lesser burden in convincing one man rather than twelve of a defendant's guilt beyond a reasonable doubt, the constitutional standard is weakened when a defendant is tried to a judge. Compare *Hibdon v. United States*, 204 F. 2d 834 (6th Cir. 1953).

In addition to the sheer weight of numbers, the diversity of a jury gives substance to the reasonable doubt standard, and insures that an accused will not be convicted unless jurors of varied backgrounds and outlook concur in the judgment.[32]

> The law has established this tribunal because it believed that, from its numbers, the mode of their selection, and the fact that the jurors came from all classes of society, they are better calculated to judge motives [and] weigh possibilities . . . than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and justice.

People v. Garbutt, supra, 17 Mich. at 22.

> Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions

[32] These same considerations have informed the Court's judgment in demanding that trial juries represent a fair cross section of the community. See pages 17-18, *supra*.

than would be reached by specialists in any given field.

Toth v. Quarles, supra, 350 U.S. at 17.

Moreover, a defendant is entitled to the interchange and testing of ideas before a criminal judgment against him is rendered. "The very object of the jury system is to secure unanimity by a comparison of views, and by agreement among the jurors themselves." *Allen v. United States,* 164 U.S. 492, 501 (1896). The verdict of a trial judge, not only represents the thinking of a single man, with all the danger of individual predispositions that this involves, it represents thinking untested by confrontation with the contrary views of others. The essential genius of the jury trial is its effect in neutralizing or diluting peculiar biases or predispositions that are held by all men "however pure, wise and eminent," and insuring that individual views will stand the test of confrontation and debate—that a judgment of conviction may emerge only if each juror becomes satisfied that guilt has been established beyond a reasonable doubt. Trial by judge denies the defendant these important protections.

(b) *The Determination of Guilt or Innocence by a Body Other Than the Trial Judge is a Necessary Adjunct of Constitutional Exclusionary Rules.*

Due process of law prohibits the introduction of evidence that was obtained in violation of the rights of the accused under the Fourth, Fifth or Sixth Amendments to the United States Constitution. *Mapp v. Ohio,* 367 U.S. 643 (1961); *Escobedo v. Illinois,* 378 U.S. 478 (1964); *Miranda v. Arizona,* 384 U.S. 436 (1966). These exclusionary rules apply without regard to the trustworthiness or reliability of the evidence in question, *Rogers v.*

Richmond, 365 U.S. 534 (1961), and frequently operate to exclude evidence, such as a confession, that is highly probative on the issues of guilt or innocence.

In a jury case, when the defense contends that evidence that the prosecution intends to offer is inadmissible under an exclusionary rule, a hearing is held by the trial judge, out of the presence of the jury, for the purpose of determining the validity of the constitutional claim. At this hearing, of course, the substance of the evidence in question is presented to the judge. The evidence can be submitted to the jury only if the trial judge determines, as a question of fact, that it has not been secured in violation of the constitutional rights of the defendant. See *Jackson v. Denno*, 378 U.S. 368 (1964).

In *Jackson v. Denno*, *supra*, the Court held that this separation of functions is mandatory under the Due Process Clause of the Fourteenth Amendment, and that the task of determining the admissibility of evidence—in *Jackson*, the voluntariness of a confession—cannot be delegated to the jury. The primary basis for the decision was the Court's recognition that jurors would be unable to exclude from their consideration a truthful, but involuntary, confession. 378 U.S. at 388-89.

Appellant submits that the dangers perceived by the Court in *Jackson v. Denno* exist whenever a single body determines both the admissibility of evidence and the guilt or innocence of the accused. It is fictitious to assume that in a close case, the judgment of the trial judge will not be influenced by his certain knowledge of guilt, derived from his exposure to a truthful, but inadmissible, confession, or from his exposure to highly incriminating, but constitu-

tionally inadmissible, physical evidence.[33] *Cf. Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Mr. Justice Jackson, concurring).

Proper operation of constitutional exclusionary rules and other rules relating to the exclusion of evidence, requires that the determination of admissibility not be made by the body determining guilt or innocence. Trial by jury permits the separation of these functions and guarantees the defendant's constitutional rights to have illegally obtained evidence and other inadmissible evidence "entirely disregarded". *Jackson v. Denno, supra*, 378 U.S. at 389.

(c) *Other Aspects of a Bench Trial Frequently Deny a Defendant An Impartial Determination of Guilt Upon Admissible Evidence.*

Contagion of the trial judge by proferred evidence which he hears in ruling on its "admissibility" is only one prejudicial incident of non-jury trials. It is no exaggeration to say that bench trials deny the defendant the benefit of most evidentiary rules. This is so for several reasons. "[I]t is virtually impossible to convince an appellate court that the receipt of inadmissible evidence in a bench trial was prejudicial. Although trial judges are given great credit by appellate judges for having reasoning powers that allow them to compartmentalize their minds and seg-

[33] That exposure to inadmissible evidence will, in fact, influence the judgment of a judge on the ultimate issue of guilt or innocence is confirmed by KALVEN & ZEISEL, THE AMERICAN JURY (1966). In connection with that work, questionnaires were distributed to cooperating trial judges for the purpose of analyzing the differences in the evaluation of identical cases by a judge and jury. Trial judges indicated the result they would reach before the jury returned its verdict in 3,576 cases. The authors found that in 828 cases, the judge would have convicted the defendant of the crime charged, but the jury did not do so. P. 110, Table 24. In thirteen percent of these cases, the judge pointed to facts that he knew but that could not be put before the jury as one explanation for the disagreement. P. III, Table 26. Certainly, there are cases in addition to this number in which such information has some conscious or subconscious influence on the trial judge but which would not be reported in this candid fashion.

regate admissible from inadmissible evidence in arriving at a verdict, as a practical matter trial judges are no less human than jurors." II AMSTERDAM, SEGAL & MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, Section 317, at p. 2-247 (1967). Furthermore, the confusion of roles of the trial judge who also tries the facts tends to promote avoidance of clear cut rulings on evidentiary issues. "[I]n a bench case, some judges make it a practice to take defense objections to the admissibility of evidence under advisement, and then when it is clear that the prosecution has a sufficient case apart from the contested evidence, they will insulate themselves from reversal by announcing that they are not going to consider the evidence, but find the defendant guilty without it. This sort of evasion of tricky evidentiary issues cannot be worked in a jury trial." *Id.* at p. 2-248.

In addition, the judge frequently comes to the determination of the guilt question against a background that makes impartial appraisal of the admissible evidence impossible. Informed by prior contacts with the case or with the defendant that he is unable to avoid, the judge who sits on the guilt issue almost invariably knows the defendant's prior record and other unfavorable personal facts. Moreover, he approaches determinations of credibility with attitudes hardened by observation of prior trials to which the defendant was not a party; and it is no accident, in particular, that he tends to believe police witnesses, since the judge has probably heard the same officer testify against a dozen, or a hundred, guilty defendants. The impact of these factors varies from case to case, but it is not the unusual situation in which one or all of them preclude a bench-tried defendant from having his guilt or innocence fairly heard on the admitted and admissible evidence and nothing else.

(d) *A Bench Trial Tends to Deny the Defendant Adequate Determination and Review of Legal and Factual Questions.*

Finally, the judge's dual role in a non-jury trial obscures by commingling the questions of law and fact which it is the defendant's right to have fairly determined and fairly reviewed. In a jury trial, the principles of law applied are clearly articulated, since the judge must charge them to the jury. Limited but meaningful review is available of the jury's factual determination under the legal principles charged by the court. By contrast, where a judge is the trier of fact, no clear cut articulation or decision of either legal or factual questions is ordinarily made, and appellate review is severely hamstrung. Bench trials thus may not merely allow, but rather tend to promote arbitrariness (See Sec. C(1), *supra*); and, at best, they deprive the defendant of the essential conditions for a clear, visible and regular decision of the separate legal and factual questions upon which his conviction depends.

VIII. *CONCLUSION*

In 1833, in his classic profile of "Democracy in America," De Tocqueville wrote that:

> "The institution of trial by jury . . . places the real direction of society in the hands of the governed, or a portion of the governed . . . He who punishes the criminal is therefore the real master of society . . ."

1 DE TOCQUEVILLE, *op. cit. supra* at 293.

At this point in our history, when vast power over

American life is exercised by an immense governmental structure in matters entirely unrelated to enforcement of the criminal law, it may be historical romanticism to adhere to the notion that the institution of the criminal jury "places the real direction of the society in the hands of the governed." But the role of dispensing criminal justice in a democracy is a particularly sensitive task and the right of the people to participate directly in this important function of government has been preserved in the form of the criminal jury. The increasing complexity and influence of modern government, where in most matters popular control is several times removed from the decision making process, underscores the urgency of preserving inviolate the direct voice of the community in the administration of the criminal law.

In *Washington v. Texas, supra,* Mr. Chief Justice Warren, for the Court, stated "the right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than other Sixth Amendment rights that we have previously held applicable to the States," 388 U.S. at 18. Appellant submits that the right of trial by jury,—"the most transcendent privilege which any subject can enjoy or wish for" [34]—similarly stands on no lesser footing than other Sixth Amendment rights, all of which have now been applied to state criminal proceedings by this Court. The judgment below should be reversed

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[34] III BLACKSTONE, *op. cit. supra* at *379.

and this matter remanded for a new trial before a jury that comports with the requirements of the Sixth Amendment.

Respectfully submitted,

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